Supreme Court, U.S.
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No. 86-1829

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ATLANTIC RICHFIELD COMPANY,
Petitioner,

v.

INDEPENDENT U.S. TANKER OWNERS COMMITTEE, *et al.*,
Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals erred when it required the Department of Transportation to provide more than a conclusory explanation of the legal basis for a rule that on its face conflicts with the enabling statute.

RULE 28.1 LISTING

Respondent Sun Transport, Inc. is a wholly owned subsidiary of Sun Company, Inc., a publicly traded corporation.

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The respondents Alaska Bulk Carriers, Inc., Cove Maritime Companies, Inc., Crest Tankers, Inc., Falcon Carriers, Inc., Sun Transport, Inc., Trinidad Corporation and Victory Carriers, Inc., respectfully pray that a writ of certiorari not issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in *Independent U.S. Tanker Owners Committee v. Dole* on January 16, 1987.

REASONS FOR DENYING THE WRIT

The court's ruling below falls well within the established precepts of the Administrative Procedure Act ("APA"). Furthermore, because of the interlocutory nature of the proceeding below, for this Court to review the decision could be a pointless exercise. The court below stayed the issuance of its mandate to enable the agency

to reassess the construction-differential subsidy ("CDS") payback issue, which the agency has now done.[1] In a final rule issued June 22, 1987 and made immediately effective, the agency has reassessed the CDS payback rule and decided to allow the three CDS-VLCCs at issue to remain permanently in the domestic trade. Thus, no CDS ships have been removed from the domestic trade because of the court's ruling. If any CDS ships are ultimately returned to the foreign trade, it will be because of a deficiency in the Maritime Administration's new CDS-repayment rule. That rule is not before the Court. The inappropriateness of review is further indicated by

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[1] On March 11, 1987, the Maritime Administration stated in the *Federal Register:*

> "MARAD hereby announces the action it intends to take. MARAD has decided to address the issue of CDS repayment through rulemaking. The tentative schedule for proceeding with such rulemaking is as follows:
>
> (1) MARAD plans to publish in the Federal Register a Notice of Proposed Rulemaking (NPRM) on CDS repayment. MARAD intends to request comments on that NPRM. A draft regulatory evaluation and an environmental assessment will be made available to the public at that time.
>
> (2) MARAD plans to publish a Final Rule in the Federal Register prior to July 16, 1987. MARAD intends to address the comments received on the NPRM in the Final Rule. A final regulatory evaluation and environmental assessment will be made available to the public at that time." 52 *Fed. Reg.* 7462 col 1 (1987).

Marad published the NPRM on April 15, 1987, 52 *Fed.* Reg. 12199 col 3 (1987), proposing that the three ships at issue in this Petition be permitted to remain in the domestic trade and calling for comments by May 15, 1987. Petitioner, Respondents and others submitted comments.

On June 22, 1987, Marad published a final rule, effective immediately, allowing the three CDS VLCCs at issue below and the CDS-built BAY RIDGE to remain permanently in the domestic trade. 52 *Fed. Reg.* 23522 (1987). A suit was filed challenging the new rule. *Independent U.S. Tankers Owners Committee v. Dole,* No. 87-1685 (D.D.C. filed June 19, 1987).

the decision of the government not to join with Petitioner in seeking rehearing below and not to support Petitioner's petition.[2]

The APA requires the agency to "incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c) (1982). A principal function of this statement is to enable judicial review, that is to reveal to the reviewing court what the agency considered, how it responded to comments, and how the agency chose to exercise its authority under the enabling statute.[3] It is not enough to recite conclusions.[4] An adequate statement is a predicate to the deference due agencies by the reviewing court under the APA.[5]

Judge Bork's decision below, representing the unanimous opinion of a philosophically diverse panel, is emi-

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[2] Sup. Ct. R. 19.6.

[3] *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 49-50 (1983) ("*Motor Vehicle*") ("We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner [citations omitted] and we reaffirm this principle again today."); S. Doc. 248, 79th Cong., 2d Sess. 20 (1946) ("The statement of the 'basis and purpose' of rules issued will vary with the rule, but in any case should be fully explanatory of the complete factual and legal basis as well as the real object or objects sought.")

[4] *Motor Vehicle*, 463 U.S. at 53.

[5] *Cf., Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962) ("Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government can become a monster which rules with no practical limits on its discretion.' [citation omitted]."); *Bowen v. American Hospital Ass'n*, 476 U.S. ——, 106 S. Ct. 2101, 2113 (1986) ("Our recognition of Congress' need to vest administrative agencies with ample power to assist in the difficult task of governing a vast and complex industrial Nation carries with it the correlative responsibility of the agency to explain the rationale and factual basis for its decision, even though we show respect for the agency's judgment in both.")

nently in line with these settled APA principles. The court did indeed discern that the agency was pursuing a deregulatory policy which the agency said in conclusory terms would serve the purposes of the Merchant Marine Act of 1936, as amended (the "Merchant Marine Act"). But, the court could not allow the agency's unexplained belief to substitute for reasoned consideration.[6] Judge Bork noted several apparent and important inconsistencies between the explicit Congressional purposes and directions underlying the Merchant Marine Act[7] and the projected effect of the rule.[8] It is not remarkable that these unexplained and serious inconsistencies failed to pass muster.

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[6] *Cf. Motor Vehicle*, 463 U.S. at 60 (Rehnquist, J., concurring in part and dissenting in part):

> "As long as the agency remains within the bounds established by Congress,* it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.
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> * Of course, a new administration may not choose not to enforce laws of which it does not approve, or *to ignore statutory standards in carrying out its regulatory functions . . .*" (emphasis added).

[7] Section 101, Merchant Marine Act, 46 U.S.C. § 1101 (1982).

[8] The court found that the agency's treatment of the explicit statutory objectives, "and of the concerns raised about them in the comment proceedings, is cursory at best." *Independent U.S. Tanker Owners Committee v. Dole*, 809 F.2d 847, 852 (D.C. Cir. 1987) (*"ITOC"*), Petition for Writ of Certiorari at 10a. The court noted "for example" the inconsistencies between the projected effect of the rule and the statutory objectives of maintaining a fleet to serve domestic and foreign commerce and to serve as a naval auxiliary. *ITOC*, 809 F.2d at 852-53, Petition for Writ of Certiorari at 11a-12a. The court described the Secretary's failure to explain as "quite serious". *ITOC*, 809 F.2d at 855, Petition for Writ of Certiorari at 15a.

Far from going beyond the requirements of the APA, the court upheld the integrity of the APA.[9] It would have been derelict of the court not to have held the agency to its minimum duty—to explain how the rule serves the enabling statute. There is nothing for the Supreme Court to correct here.

Petitioner faults the court below for not going far enough, for not evaluating whether the rule could possibly be consistent with the Merchant Marine Act. It is well settled, however, that it is not the court's function to fill the gaps left by the agency.[10] It is a corollary of the notion of agency primacy, indeed of the constitutional role of the faithfully administering executive, that the agency and not the court provide the rationale upon which policy must be based.

Petitioner suggests that the decision below and the court's 1982 vacation of an earlier CDS payback rule,[11] are instances of an activist court substituting its judgment for that of the agency's and thereby frustrating the agency's policy initiative.[12] To the contrary, the two decisions represent a court trying to preserve the agency's chosen policy initiative, while at the same time honoring the minimum required by the APA. No CDS repaid ship has yet been put out of the domestic trade

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[9] *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962) ("This is not to deprecate but to vindicate [citation omitted] the administrative process . . .")

[10] *Motor Vehicle*, 463 U.S. at 51; *Bowen v. American Hospital Ass'n*, 476 U.S. ——, 106 S. Ct. 2101, 2112-2113 (1986).

[11] *Independent U.S. Tanker Owners Committee v. Lewis*, 690 F.2d 908 (D.C. Cir. 1982) ("*ITOC v. Lewis*").

[12] Petitioner relies heavily on *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), suggesting that the court below invaded the province of the agency, when in fact the court only insisted that the agency do its job. The court did not impose on the agency any new procedures or dictate alternatives. Cf. *Motor Vehicle*, 463 U.S. at 51-52.

by either decision. In *ITOC v. Lewis*, the BAY RIDGE remained in the trade (and does to this day) while the agency reconsidered the issue on an as yet uncompleted 1982 remand. In the decision below, the court stayed the effectiveness of its mandate for six months, again leaving the CDS repaid ships in the trade while the agency attempts to correct itself. The only functional difference between the decisions is that the court below acted to prevent a lingering remand. The decision below is, therefore, a balancing of the agency's initiative against the Respondents' rights. It is a judicious administrative law decision.

Beyond the fact that there is nothing here calling for the Court's intervention, the Court's review could be of little or no practical effect. If, as Petitioner requests, the Court were to reverse the decision below and hold that the court should have decided whether the rule can be squared with the Act, the effect of that reversal would be to undo the vacation of the old rule. The agency has now made a new policy decision on a new record, however. The agency has made final its proposal to leave the CDS repaid ships in the domestic trade. That decision is based on a new explanation, and judicial review by the lower courts has commenced. The Petitioner will have the substantive judicial review that it asks for here. If, on the other hand, the Court were to affirm the decision of the court below, the fate of the three CDS ships at issue would still be determined by the new rulemaking. Thus, this Court's intervention is not necessary.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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